



Order Decision

Site visit made on 6 September 2017

by **Alan Beckett BA MSc MIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 19 July 2018

Order Ref: ROW/3172059M1

- This Order is made under section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Northumberland County Council Definitive Map Modification Order (No 6) 2012.
- Northumberland County Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 15 October 2012. The Order was the subject of an interim decision dated 18 September 2017 in which I proposed to confirm the Order subject to modifications which required advertisement.

Summary of Decision: The Order is confirmed subject to the modifications set out in the Formal Decision.

Procedural Matters

1. Following the unaccompanied site visit I made in September 2017, I proposed to modify the status of the route to be recorded along with its width. I also proposed consequential modifications to the definitive statement in respect of Elsdon public bridleway 5.
2. In response to the advertisement of the proposed modifications, one objection regarding the proposed width of part of the proposed Restricted Byway No 46 was received from Mr A D Kind, the applicant for the Order. Responses to that objection were received from the Council who supported the modifications proposed in my interim decision.

The Main Issues

3. It is common ground between the parties that the route at issue in the Order is subject to public vehicular rights; that part of the Order route north of the Raylees Burn is described as a "*publick highway or road*" in an Award made under the provisions of the Elsdon Common Inclosure Act of 1729. The evidence considered in the interim decision strongly suggested that the continuation of the Order route south of the Raylees Burn was also a public vehicular way and formed part of a long-distance cattle droving route known as the Great Drift Road.
4. The sole point of contention between the parties is the proposed width of that part of Restricted Byway No 46 running south from Raylees Burn to the current A696 road.

Reasons

5. Mr Kind submits that the reasoning set out in paragraph 25 of my interim decision is irrational in two places. Firstly, whilst Mr Kind acknowledges that

there is no specific evidence as to the pre-inclosure width of the route south of Raylees Burn, he contends that the route is no different in character to that north of Raylees Burn and the setting out of a route at 14 yards to the north of the burn is evidential of the width of the route south of the burn. Secondly, Mr Kind submits that a width of 5 metres (as proposed) whilst reasonable for the passage of vehicles, is not reasonable for the driving of cattle along a major droving route and notes that Advice Note 16 provides that the recorded width should be based on "*evidence provided during the confirmation process, or, where there is no such clear evidence the type of user and what is reasonable*".

6. What is reasonable in the light of an old droving road is, in Mr Kind's submission, a width which reflects the historical use to which the highway had been put. In Mr Kind's view, I had misdirected myself on the matter of the presumed width of the highway given the way the Inclosure Commissioners treated the widths of the public highways set out in the award; in the circumstances of this case, Mr Kind submits that the width of the route south of the Raylees Burn must have been 14 yards or thereabouts.
7. In supporting the proposed modifications, the Council does not accept Mr Kind's reasoning. The Council submits that the awarded width of the route north of Raylees Burn might (but might not) reflect the width of the route being used at that time and that the width of the southern section cannot be defined on the basis of what the Inclosure Commissioners considered was necessary north of the burn. The Council submits that there is no evidence that the route south of the burn had been enclosed by boundaries, whereas north of the burn there was evidence that part of the route was so enclosed. In the Council's view a width of 14 yards may have been necessary on an enclosed route.
8. Mr Kind has produced a transcript¹ of those parts of the inclosure award which deals with the setting out of public highways. In their award, the Commissioners set out 15 public carriageways but only specified a width for two of these routes; one being that part of the Order route north of Raylees Burn set out at a width of 14 yards (12.8 metres). Other than a road at Whiskershiels (11 yards), Mr Kind notes that the width of the remaining 13 awarded roads are not specified; it is his contention that the remaining roads were to retain their pre-inclosure width as provided for in the 1729 Act.
9. In Mr Kind's view, the only reason why 2 routes out of 15 had a specified width was that these roads were wider than roads generally in the area at the time and needed to be kept wider after inclosure. In his submission, Mr Kind poses the question "*What other reason could there rationally be?*"
10. If the Order route had historically been wider than other roads in the area and the powers available to the Commissioners provided for the retention of roads at their existing widths (irrespective of how wide they were) there would be no reason to specify a width in the award. The Commissioners could have easily awarded the road to ensure that the rights over it were retained. The Commissioners however, chose to do otherwise. What then could have given rise to the Commissioners having to specify a width for this section of road if it was not necessary to do so?
11. Mr Kind says that the reason why a width of 14 yards was specified must have been to reasonably accommodate cattle droving traffic along a route which

¹ A copy of the original manuscript text of the award was also submitted

- formed part of the Great Drift Road and not to accommodate vehicular traffic because the existing width of the pre-existing roads set out in the award already provided for that. I do not disagree with that proposition, but a likely reason why a width had to be specified was that this section of road which had hitherto run over unenclosed common was to be re-aligned and inclosed between walls or fences as the surrounding common was sub-divided.
12. The Commissioners were empowered to "*ascertain and appoint the public and private highways or roads already made or to be made on the said common or tract of land*". It is clear from this provision that the Commissioners were empowered to "*ascertain and appoint*" both existing roads (*'already made'*) and ones which they considered were required (*'to be made'*) to facilitate the inclosure process. From the description in the award of the route on the north side of Raylees Burn and from the representation of the awarded route on the inclosure plan, it seems highly likely that this part of the route was being set out on a new course.
 13. The award map shows that the awarded route was to run over the inclosures being made on the common and was in part to run adjacent to or through the walls or fences which separated those inclosures. The awarded route is notable for the three right angle turns in its course north of the burn. This is in contrast to the sinuous nature of the pre-inclosure *'common highway or road leading to Knightside'* which is shown by means of a double peck line on the inclosure plan. I consider it to be highly unlikely that pre-inclosure drovers would have followed a route which included three pronounced right angle turns over an otherwise open common. It would appear that this section of the pre-existing road was being re-aligned and set out on a new course which would require the Commissioners to specify not only the alignment of the road but also its width.
 14. There is no evidence as to the pre-inclosure width of the road over Elsdon Common. As part of the route was to run between fences or walls it is understandable that the Commissioners would set out a width which would accommodate the likely traffic which would use the road. A width of 14 yards is in all probability significantly wider than what would have been required for early eighteenth century wheeled traffic and is likely to be what the commissioners considered to be necessary to accommodate livestock being driven along an enclosed road.
 15. Where a road passed over unenclosed land and became founderous, users would have utilised drier and firmer ground to the side to avoid wet, boggy or treacherous ground found on the principal line of the road being followed. On unenclosed land with no physical constraints such deviation would be relatively straightforward but would become impractical or impossible where the route passed between boundaries. The post-inclosure route is shown as having been constrained between walls or fences for part of its length, with the remainder being constrained only to the east. Having viewed the site, it is understandable that the Commissioners awarded the road at a width of 14 yards; such a width allowed for the deviation around wet or boggy ground which would not have been possible if the road had been constrained between walls at a lesser width.
 16. In contrast the route south of the burn runs over moorland parallel to a wall to its east; there was (and is) therefore no constraint upon users who wished to avoid founderous conditions. The awarded width of 14 yards north of the burn does not therefore assist in the understanding of the pre-inclosure width of the

route south of the burn nor can it be determinative of the pre or post-inclosure width of the route south of the burn. A width of less than 14 yards over unenclosed land may have been adequate for the passage of vehicles and livestock where the ground was suitable with a greater width being required as and when the route became foundrous. However, what those widths may have been is unknown.

17. Although Mr Kind submits that the route north of the Raylees Burn is no different in character from the road south of the burn and considers the awarded width north of the burn to be evidential as to the width south of it, the route to the north of the burn is partly enclosed by walls and where not fully enclosed, is constrained to the east by a wall and has a number of right-angle turns in it. There are therefore differences in the physical characteristics of the route north of the burn compared with those to the south of it.
18. The Commissioners were not concerned with the route to the south of the Raylees Burn which ran over land outwith the lands being inclosed under the 1729 Act. Although Mr Kind considers that the width of the road south of the Raylees Burn would have been 14 yards or thereabouts if that was what was required north of the burn, there is no evidence to establish that south of the burn such a width was in use prior to Elsdon Common being inclosed. In awarding the road north of the burn at a width of 14 yards, the Commissioners appear to have set out what they considered would be required for the purposes of droving if the road changed from crossing open unenclosed common to a route which was constrained in part by fences or walls.
19. As noted in my interim decision, there is no direct evidence with regard to the width of the route south of Raylees Burn in the documentary evidence submitted by the parties. As a result of the inclosure process, the route north of the burn was of a different character to that found to the south of the burn; consequently the awarded width north of the burn does not in my view provide evidence of the pre-inclosure width of the route to the south of the burn.
20. In paragraph 25 of the interim decision, I concluded that a width of 5 metres is likely to be reasonable for two vehicles to pass each of on a Restricted Byway. Equally anyone wishing to engage in the droving of livestock over the route south of the Raylees Burn is likely to find a width of 5 metres over open land to be reasonable in ordinary circumstances.
21. I do not consider that the interim decision regarding the width of the route south of Raylees Burn was irrational or that I had misdirected myself on the matter of presumed width. It follows that I do not consider that further modifications are required to the Order.

Conclusions

22. Having had regard to these and all other matters raised in the written representations in connection with my proposed modifications, I conclude that the Order should be confirmed with the modifications I previously proposed.

Formal Decision

23. I confirm the Order subject to the following modifications:

throughout the Order and Order plan, replace any reference to Public Bridleway 45 and Public Bridleway 46 with Restricted Byway 45 and Restricted Byway 46;

in the Index insert 'Elsdon BR 5 Part Deletion NY 99 SW 121';

in the order plan replace the symbol used to identify Bridleway 46 and 46 (that is a bold broken line with cross bars in the intervals) with the symbol for a Restricted Byway (that is by a broken line with small arrowheads);

in the schedule for Restricted Byway No 45 amend part I to read 'Adding thereto a restricted byway, from a point marked B on Restricted Byway No 46, 10 metres west of Hillhead Cottage in a north-westerly then easterly direction for a distance of 675 metres, to a point marked F, on the C187 road, 420 metres north of Hillhead Cottage.';

in the schedule for Restricted Byway No 45 amend Part II to read 'A 12.8 metre restricted byway from Restricted Byway No 46, 10 metres west of Hillhead Cottage in a north-westerly direction for a distance of 465 metres, then in an easterly direction for a distance of 210 metres, to join the C187 road, 420 metres north of Hillhead Cottage.';

in the schedule for Restricted Byway No 46, amend part I to read 'Adding thereto a restricted byway, from a point marked A, on the A696 road, opposite that road's junction with Bridleway No 36 (Parish of Otterburn), 450 metres south-east of Blaxter Cottages, in a generally northerly then easterly direction for a distance of 1635 metres to a point marked B on Restricted Byway No 45, 10 metres west of Hillhead Cottage.';

in the schedule for restricted Byway No 46, amend Part II to read 'A restricted byway, from the A696 road, opposite that road's junction with Bridleway no 36 (Parish of Otterburn), 450 metres south-east of Blaxter Cottages, in a generally northerly direction for a distance of 1530 metres, and crossing Raven's Cleugh and the Raylees Burn, then in an easterly direction for a distance of 105 metres to join restricted byway No 45, 10 metres west of Hillhead Cottage. Width: between the A696 road and Raylees Burn: 5 metres, between Raylees Burn and Hillhead Cottage 12.8 metres.';

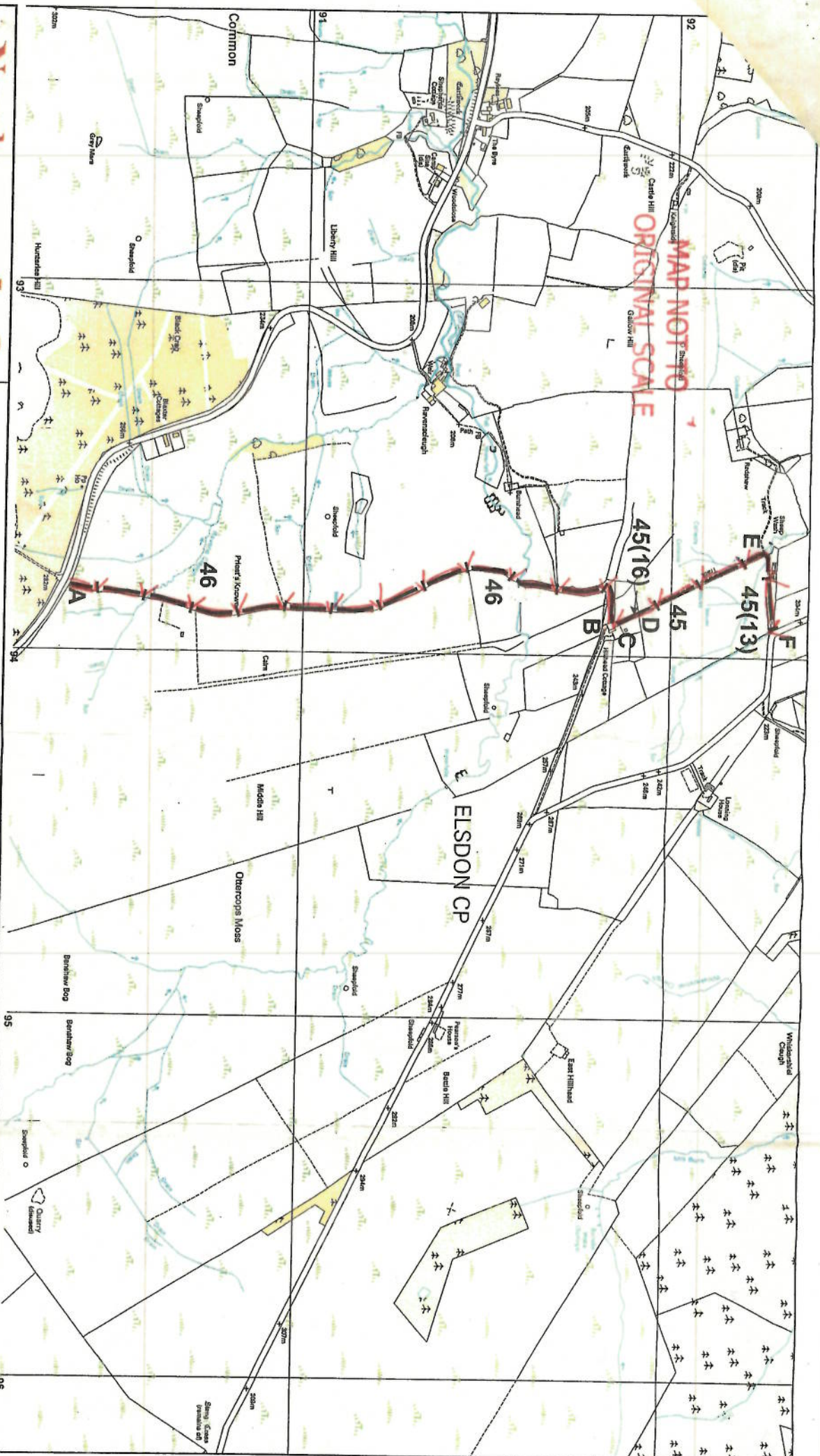
insert the following:

Elsdon		Bridleway No 5	(NY 99SW)
Part I	Map	Deleting thereto the public bridleway, from a point marked B, 10 metres west of Hillside Cottage to a point marked C, 20 metres north-west of Hillside Cottage. This deletion is a consequence of upgrading this section of bridleway to restricted byway (RB 45) status.	
Part II	State ment	To be amended as follows: From the Monkridge – Soppit road east of Monkridge in a north-easterly, easterly and south-easterly direction, crossing the Elsdon – Raylees road at Castle Hill, passing by Knightside, crossing Footpath No 14 and	

Footpath No 15, to join Restricted Byway No 45, 10 metres west of Hillhead Cottage. Resuming at a point 20 metres to the south-east, at the junction of Restricted Byways No 45 and 46, passing to the south of Hillhead Cottage and proceeding in a south-easterly direction to join the Elsdon – Harwood road south of Lonning House.

Alan Beckett

Inspector



MAP NOT TO ORIGINAL SCALE

Northumberland
 Northumberland County Council
 Sustainable Transport
 Local Services

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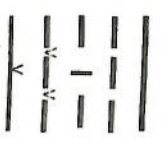
Wildlife and Countryside Act, 1981

Definitive Map of Public Rights of Way for the County of Northumberland

The Northumberland County Council

Modification Order (No.6) 2012

Public Right of Way closed
 Public Footpath
 Public Bridleway
 Restricted Byway
 Byway Open to All Traffic



O.S. Map NY 99 SW	Definitive Map No 121	Scale: 1/10,000
Former District(s) Alnwick	Parish(es) Elsdon	Date: July 2012